A SCOTTISH JUDGE ORDINAR.*

Warte nur:—Balde
Ruhest du auch.
Goethe.

In every life which has been fairly fortunate, there should come a period, it may be brief enough, when rest can be taken between the end of the work that has been done and the beginning of the sleep that knows no break on this side of time. In this interval retrospection is natural, and it must have been a dull life indeed if there has been no change occurring within its experience worth recording. In this time also, if one has had fruitless aspirations after improvement, one comes to dwell with a feeling of sadness on the little that has been done to carry them out, and on the specially little which he himself has been able to contribute to their advance. In my own case after half a century of law, forty years of which or thereby, spent in the public service, I ought to have seen something, and a certain interest may be considered to have attached to what I may, for want of another word, call my career, inasmuch as my time has been spent in the exercise of a system of law, which, as a separate system, has long outlived its usefulness and is doomed to extinction, sooner or later.

I entered the law owing to accidental circumstances, much against my better judgment and sorely against my will. The little legal reading which I had done was in the works of law reformers like Bentham and Brougham and I had imbibed a thorough dislike to the whole structure of our legal system. The experience of a life has only confirmed the accuracy of my early impressions. Indeed, I may say that if there was any profession which, as a youth, I detested, it was that of a lawyer. Up to the age of eighteen, I was educated with the view to be a Civil Engineer, a profession for which I had a liking. From fifteen to eighteen I had spent most of my time,—latterly at the University of Edinburgh,—studying mainly branches that would be useful for that profession, though by no means confining attention to them. When the time came for leaving the university and entering an apprenticeship, it had become plain that I would ultimately have to go to India for employment.

I had an opening there, some relatives having responsible positions on the Indian railways then in course of construction. I was myself keen to go to India, but my father, who was a physician, objected. I was not physically strong and he had the idea, probably a quite right one, that if I went to India I would not stand the climate. And so India and the engineering had to be given up. As being nearest to engineering, I thought of architecture, and for three months I was in the office of a leading Edinburgh architect as an experiment. I found that I did not care sufficiently for architecture, and I harped back to the idea of engineering. To keep me from it my father made me a handsome offer. At that time the Scottish bar was considered the highest profession in Scotland. It had then two special advantages in my eyes: it was an easy profession to enter and an easy one to leave. There being no end to the eccentricities of British law, the mode of entrance to the Scottish bar at that time could hardly be credited now. There was no curriculum of study and examinations were unknown. All one had to do was to pay a fee of some size and to write a thesis by himself or by deputy. Some pains were taken to see that the "intrant" was respectable and he had to submit to a ballot by his future brethren of questionable legality. This was all well known and was justified on the plea that it was not necessary that a Barrister should know anything, because he would get no employment unless a Solicitor, who was required to know something, chose to come to him. It was a system of entry even more ludicrous than that customary in England, where it was necessary, at all events, for the candidate to spend some time, though it might only be in dining, in the society of older Barristers. The Scottish bar afforded, till fifty years ago, a profession which it was customary to join as a matter of form, as giving a certain standing, and then soon to leave for literary or scientific pursuits, for public appointments and occasionally for professorships. All that has changed.

Such being the state of the bar, I resolved to enter it and escape as soon as I could. The height of my ambition was to obtain some professorship, though I of course kept that to myself, professorships being very difficult of attainment. As it turned out I had reckoned without my host. The system of allowing candidates to enter without qualification was, before I had actually entered, brought suddenly to an end and I was left with the choice of either abandoning the advocateship and having it said that I was afraid of examinations, or of going on and acquiring some professional knowledge. And this very fact of such knowledge being required made the chance of escape much less. One became branded as a professional lawyer

which seemed to disqualify for other lines of life. I never escaped altogether from law, but I escaped early from what was always to me the most disagreeable prospect about it, that of having to practice in the courts, and ultimately, though long afterwards, I arrived at what I most desired, the professorship.

When I consented to become a Scottish Barrister I was young and had time to spare. I spent two other years at the university mainly attending literary classes, and I also attended the classes in the law faculty. One can hardly believe at this present day what a wretchedly equipped faculty it was, though it was the leading law faculty in Scotland. There were only three classes in it,—Roman Law, Scots Law, and the thing called Conveyancing. The Roman Law was taught in a peculiar fashion. The course was neither historical nor expository, but a sort of compound of the two, as old-fashioned and as poor as it could well be. The Scots Law Class was much better, though very uninteresting. It was taught by an elderly, amiable gentleman who faithfully read his lectures year after year, pigeon-holing new cases as they were pronounced. The lectures were dryness itself, but the old gentleman had so amusing an enthusiasm for his subject and was in himself so likeable that one could not help profiting to some extent. The best class for practical purposes was the Conveyancing. It was taught by a Solicitor who knew little beyond his subject, but knew it thoroughly. The subject itself was as repulsive as it could well be. I notice that Scots Conveyancers never have a word that is too bad for English Conveyancing, and that English Conveyancers return the compliment. It has always struck me that so far both were right. I would be supposed, as a Scottish Barrister, to know some Roman and some Scots Law, but luckily I was not supposed to know Conveyancing and I never, in fact, knew anything of it except what fell under the ordinary law of contract. As a County Court judge I did not require to know technical Conveyancing. I remember only once being asked to do anything in it. I was asked by two worthy solicitors to undertake a reference upon a Conveyancing question. I told them there was only one thing I could bring to the decision, an entire freedom from prejudice, my mind being a blank upon the whole subject. My friends did not persist in their request, and I did the best I could for them by recommending them to a Solicitor who had a good knowledge of the subject. The miserable provisions I have mentioned for the study of Law had been sufficient in Scotland, because, in bygone days, Roman Law had been the leading authority, and young Advocates studied it abroad, in the low countries, in Germany, and in old times in Italy and in France. In

the times when Roman Law was the law of the civilized world, it mattered little in what country one learned it. I passed through the law curriculum, such as it was, without desiring or getting distinction. I took a certain interest in Roman Law on account of its antiquarian and archæological connections. To Conveyancing I paid no attention. Of Scots Law I acquired some little knowledge.

After finishing this introduction to law, it was customary for young Advocates to spend some time in a Solicitor's office. I by no means wanted to go near such a place, but as it postponed the final step of entering the Bar, I was glad to escape the evil day for a while in the hope that I might be able to escape it permanently. I accordingly entered, for a year, the office of what was called a "Writer to the Signet," which is the name given to the best class of Scottish Solicitors. I found my master an estimable and pleasant gentleman and I liked him and the practical work to which the office introduced me. At the end of my year he and I had got on so well that he proposed to pay me to remain another year, and I accordingly did so. At the end of the second year, it happened that he suddenly lost his head clerk. I was offered the place with a room to myself and five other clerks to superintend. I took it for a year and this work I again found interesting. At the end of the year my master offered me a partnership if I would remain, and if I had any inclination to be a lawyer for the rest of my life, I should have accepted his offer. Had I become a Solicitor, however, all hope of escape from law would have been gone and I should have shut myself up in a lawyer's office for the rest of my life. Without further delay I resolved to enter the bar. It was with a wrench that I did so, for I saw the risk of tying myself for life, and of thus surrendering any chance I had of making a name.

I found the new system of the examinations beginning. The President of the Society of Advocates,—the Dean, as he was called, —had been educated at Oxford, and had faith in examinations and in degrees. He accordingly instituted two sets of examinations, the first, upon General Knowledge, and the second, upon Law. In General Knowledge, what was ultimately aimed at was to make each Advocate qualify as a Master of Arts. If he had an M.A. degree, that franked him through the General Knowledge examinations. If he had no degree he was to take an examination in the various subjects for the M.A. degree and the same standard. I had not taken a degree because, when I was an Arts student, nobody thought of taking one at Endinburgh University unless he intended to become a teacher. Accordingly, I had to pass the General Knowledge examnination. The only good that I got was that, instead of

an examination in Greek, of which I knew little, I was allowed to take one in two modern languages, namely, in French and German. I passed the examinations without much difficulty, although they were harder than if I had passed them while still at the university. The examiners were mostly professors in the University of Edinburgh, and it was the last occasion on which I saw the worthy old gentleman who is now remembered only on account of the savage and most undeserved attack which was made upon him by a great poet.

After I had passed the General Knowledge examinations, the new system required that I should spend a year without being in a Solicitor's office before entering the bar. The object of this curious regulation was twofold, to prevent solicitors coming as had frequently been done, straight from their offices to the bar; and to encourage a reversion to the old system of study abroad. It failed in both respects. Solicitors still came to the bar, but in place of spending the year before passing in their offices, they now spend it in the Chambers of an Advocate. It suited me well to go abroad for the year, and many others about that time did the same, but that reversion to an old practice has again fallen into abeyance. It was found that in place of helping one to get into practice, it had rather the effect of disqualifying. The Scot had discovered that the best education he can get for practical purposes is after completing his Scottish education to take to an English university and become a graduate of Oxford or Cambridge. The English are good enough to say that a Scot whose education has been completed in England makes a typical Englishman, and there seems, indeed, to be nothing which a Scot so educated can fail to attain. Whether he wants to be a Prime Minister or a Professor, a Judge, or a School Inspector, there is nobody has a chance of getting on equal to that of a Scot who has finished his education in England. Except in Science, it does him little good to study abroad. I went abroad because I would get to places where I could forget about Scots Law and might see a wider life.

I spent the winter in Berlin where I attended the university. The city was very different from what it is now, having only about a quarter of its present population. The university was also much smaller, though it had many distinguished men, especially in the legal faculty. Keller, one of the last who wrote on Roman Law in Latin, was one of the leading men. Rudolph Gneist and Stahl were both eloquent and learned men who contrived to throw popular interest into legal studies. I also studied under Casper, the distinguished medical jurist, whose department, bordering as it did on

criminal law, was the legal one in which I took much interest. I must admit that, except in Roman Law, I did not spend much of my time in studying. I was mostly to be found in the museums and picture galleries, and occasionally attending the lectures of the professors who lectured on Art subjects. Naturally, I was much interested in German manners and customs. I had many introductions and I went a good deal into German society. One of my introductions was to a then famous court preacher. When I asked what was the best day for calling on him, I was surprised to learn that Sunday after his service would give me the best chance of seeing him. When I went, my notions of the Scottish Sabbath, which, by the way, were never particularly strict, received a shock. The great preacher told me that Faust was being performed that evening at the leading theater and recommended me to go. I soon fell into the ordinary custom in these matters and, like the other students, I frequently went to places of amusement on Sunday evenings. My two principal companions were curiously enough two students of divinity who afterwards rose to eminence, and became lifelong friends. There was only one other Scottish student at the university—a member of a strict sect. One Sunday evening I met him in a large concert hall, and the moment he saw me he fled, much to the amusement of my companions, and it was weeks before I saw him again. At the Court theater, the great attraction was Emil Devrient, one of the first actors in Germany, and indeed I would say the finest actor I ever saw. If asked to define him, I would say that he was in acting what Van Dyck was in painting.

The great work which the nineteenth century did on the continent of Europe was the codification of the law. It began in the early years of the century with the French Code, and ended its last years with the completion of the German Code, the greatest legal work which the world has seen. When I was in Berlin in 1856, shortly after the middle of the century, the controversy over the good or evil of codification was at its keenest. Savigny, who had thrown all the weight of his reputation into the scale against it, it is true, was dead. And so, also, was Thibaut, a less famous, but still a very distinguished man who maintained the affirmative and had opened the discussion. But the discussion continued, and was made more active by a beginning of the codes having been made. It penetrated to the university. Stahl announced his principle that conservatism was against codification, but among the youth he made few converts. Gneist was on the other side, and the youth followed him, and by and by became the men who helped to carry the German Codes to their successful finish.

From Berlin I went southward to Dresden, and, following the advice of an old-fashioned school master whom I met at Juterbog, I by no means missed seeing the Picture Gallery. I think I spent nearly my whole time in it for about a fortnight. I was particularly interested in making the acquaintance of Gustav Klemm, who, long before Darwin and Taylor, had made many interesting observations on the evolution of civilization and had collected a delightful private museum (now in Leipzig) showing side by side the implements used by the prehistoric races and those used by rude nations of the present day. From Dresden I went to Prague where I had an introduction to Palacky, the well-known Bohemian historian. I remember wishing to make out that we still had a nationality in Scotland, but he treated that notion with contempt, telling me that our nationality in Scotland was "a nationality of the graveyard." I have thought since that he was not far wrong. From Prague I went to Vienna where my father had studied, and through his introductions I made acquaintance with some distinguished men in their days in medicine, of whom I best remember Oppolzer and Rokitanski. From Vienna I crossed by the Semmering Pass, then a railway wonder, to Trieste, where I came in contact for the first time with Italians and found a large Greek element. Crossing from Trieste to Venice, the first tring I saw of Italy was the famous tower of St. Mark (now fallen), and the Euganian Alps in the background.

Italy in those days was very different from what it is now. One might almost say that in it the Middle Ages still survived. From the time of the fall of the Roman Empire, Italy had been a field of battle in which barbarian and alien races fought with Italians or with each other. It was near the ending of that strife that I visited Italy. In two years began the movement which made it an independent country. When I was there the "barbarians" held most of the places of strength. The Austrians were still in Lombardy and the duchy of Milan; Parma, Modena and Tuscany were dukedoms held by German families, and there were Austrian garrisons in many a town. The States of the church were still subject to the Pope, who maintained his sacred rule by the aid of a French garrison lent to him by that distinguished Christian emperor, Louis Napoleon. The Bourbons still held Naples and Sicily. Naturally, everything was in a backward state. There were next to no railways. The modes of communication was still by diligence or *vetturini*. There was no sort of secular education worth speaking of. In the towns, sanitation was unknown, and the streets were lit by dim oil lamps suspended in the center. To make up for these draw-

backs, the place was far more picturesque and the customs more amusing. You could buy nothing without bargaining for half an hour for it. Even in the leading hotels you had to bargain for your rooms as you have to do yet in out-of-the-way places. If, on a short visit, you omitted to bargain and a hotel-keeper overcharged you, you calmly struck off the excess, and he, after making a disturbance as if he was going to bring the heavens down, would smile pleasantly and allow you to depart, giving you a thousand thanks and hoping you would soon come and see him again.

Costumes in those days were picturesque. The village costumes, which nowadays you see only when the nurse of some rich family is decked out in the dress of her native village, were to be seen at all times. The cardinals still drove, arrayed in their robes, in their large carriages with the stately black horses. In the streets there was any quantity of music, mostly bad, and of dancing, seldom graceful. Except in the great hotels, which I rather avoided, nothing was spoken but Italian, and, under pain of starvation, you were forced to learn some of the language.

Beneath the surface there was sullen discontent. When the band of the Austrian garrison played on the place of St. Mark, no Italian would stop to listen. At the balls, I was told that no Italian girl would dance with an Austrian officer, and I noticed that the restaurants which the Austrians frequented were empty of Italians. Wherever the Italian language was spoken, the sentiment of Italian nationality had spread, and the desire of all was for Italian unity and Italian freedom. Two years after I had been in Italy, the movement of expulsion began. The Austrians were driven out of Lombardy, and barely thirteen years after I was there, the last nail was driven into the coffin of the stranger's domination, and the French were driven from Rome, and the Roman States incorporated in the Kingdom of Italy. It was then that the Pope retired to the Vatican, where he still sits watching and brooding, a voluntary prisoner. But he serves a good purpose, for he is a living warning to the Italians not to quarrel amongst themselves. They know if they do, they have one amongst them with the church at his back, who, forgetting nothing and forgiving nothing, is ready at the first opportunity to call in the bigoted from all lands to crush their liberties.

I traveled through the most of Italy, visiting all the great towns of Lombardy, through Parma, Modena and Bologna, to Florence, and so finally to Rome and Naples, with an occasional little excursion on foot in the company of artists through the Apennines and elsewhere. I came back by Genoa, where I had the good fortune to get a glimpse of a revolution. Through Milan and the Italian lakes,

I made my way to Switzerland, and now, when the Simplon has been tunneled, it is curious to remember that the best way I could think of crossing it, was to cross it on foot. Then through many a fair town of France and down the Rhine I made my way by Belgium and Holland back to London and Edinburgh. The net result of my year abroad was that I spoke three foreign languages with fluency if not with great accuracy; that I made a miscellaneous, but useless acquaintance with the fine arts and archæology, and that I felt certain that the small prospect of practice which I ever had was gone.

When I got home, I found myself with no means of escape from the bar, and I had to make up my mind to pass the examinations in law. There were two branches of them, the private, which were new, and the public, which were old. The private examinations were a business affair. They were conducted by a committee of the faculty of advocates with the assistance of my old friends, the Law Professors, and I believe I got through them creditably. The public examinations were amusing. They consisted of what, till then, had been the only examinations. They were nominally conducted in Latin and were modelled upon the degree examinations of foreign universities. I had to write and defend a thesis. Contrary to the usual practice, I wrote my own, and if I did not then remember much of Latin composition, I had a fair knowledge of German, and whenever I was at a loss for a classical idiom, I stuck in one of that language, and I found that my thesis passed with credit. The disputation over the thesis had come down to the merest form. I wrote out in Latin three objections to the doctrines I was supposed to maintain and I handed these to three friends. At a public meeting of the faculty, I read out aloud the concluding articles of my thesis supposed to be my leading propositions, three in number. Each friend I had brought to the meeting read his objection, and I, having an answer in Latin prepared, replied triumphantly. There was then a ballot of the members present, and I was admitted unanimously. I then donned my robes and was taken to the president in the retiring room where I found him in his shirt sleeves preparing for the court, and I was solemnly introduced to him. Then I was taken to the court, where I had to take an oath. A three-cornered hat was laid down in front of me, and I believe I had the privilege of putting it on and giving the court a Latin address, but as nobody had exercised that privilege within the memory of man, I refrained and retired quietly, a full-fledged barrister.

About fifty years ago, Edinburgh was much the same place as it is to-day, only somewhat smaller, though it had greatly increased from what it was of old and had become, to a large extent, a man-

ufacturing town. It had also become more provincial. The picturesque parts of the old town remained, but they were no longer inhabited by lords and ladies, philosophers and historians, or others of high degree. They had become ill-lit, ill-ventilated, overcrowded, unhealthy places, inhabited by the very poorest, or even by criminals. Of the aristocracy who, in the days when Edinburgh was a capital, used to frequent the town, there was only one family which still had a town residence. The others, when the gentlemen came to Edinburgh, as they sometimes did to consult their lawyers, frequented a club, which they kept up with the help of the most select of their solicitors. The Edinburgh of Sir Walter Scott was long gone by. It was no longer his "own romantic town." A few of the staff of Blackwood and the Chambers remained, but the connection of the city with literature was slight and every day becoming slighter. The publishing houses were transferring their headquarters to London, leaving only their printing offices behind them. As for political power, that had gone to London, and the main stream of commerce had found its place in Glasgow. Except for the law courts and the Presbyterian churches, it no longer had any claim to be considered a capital. The lawyers had shrunk into a mere professional body, taking little or no part in public life. The union, which for so long a time had lasted between law and literature, was gone. There were no doubt still some professors and some literary men who were advocates, but they no longer made any pretence of practice. The practicing men had become, or were rapidly becoming, mere lawyers. The churches gave the town somewhat more of a pretence to being a capital. Their annual congresses were held in Edinburgh and it was the scene of the long and bitter feuds which, for the cause of righteousness, took place amongst the churchmen from all parts of Scotland. The churches were often crowded places. What is now called the United Free Church was probably the leading church. It had men of high standing like Chalmers, Guthrie, and Candlish, born leaders of men. The Established Church occupied a secondary place and its leading men, like Dr. Robert Lee, were looked on by the bulk of the body as rather heretical. The Episcopalians, though fashionable, occupied a small part in public life. Probably their leading man was Dean Ramsay, best known as a collector of Scottish stories.

What gave the town distinction was its university. John Wilson, the Christopher North of Blackwood, had only recently passed away when I settled in Edinburgh, and one of my earliest recollections was going to hear him give one of his inspiring lectures. Aytoun was in full vigor, genial and eloquent. Blackie, the eccentric pro-

fessor of Greek, was coming upon the field. In the philosophical school, Sir William Hamilton was the great leader. The medical school of the day was very famous. Goodsir and Christison are still remembered. In the School of Natural Science, Jameson, the mineralogist, had just passed away. James D. Forbes, the writer on glaciers, held the Natural Philosophy chair, and Peter Guthrie Tait, his able successor, was then a student. There were many other professors who well deserve naming, but of whom I confine myself to mentioning Dr. George Wilson, known as a technologist. All these I personally knew, more or less intimately, and my pleasantest associations with Edinburgh are connected with my intercourse with them. In literature, Edinburgh in those days still held a place. Burton, the historian, was in full vigor, and Cosmo Innes was a distinguished antiquarian. Then James Lorimer was well known as a writer in the reviews. The ablest and most original man of the time was the late John Ferguson Maclennan, whose works on Primitive Marriage really helped to begin a new epoch. James Payn, author of many novels, was also editor, and a contributor to magazines. The newspapers of that day in Edinburgh were still leading organs of public opinion. The *Scotsman* was a power in the land, and the Edinburgh *Courant,* under James Hannay, was a brilliant paper. Alexander Smith, poet, and John Brown, essayist, both worthy and lovable men, threw gleams of light on the literary world. Andrew Findlater, most delightful of Scotsmen, came from his native Aberdeenshire to edit *Chamber's Encyclopædia.* He was a man of an extraordinarily wide field of learning. All these men I knew well, much better than I knew the lawyers, and with many of them I became associated in work.

To add distinction to Edinburgh in those days, there was a school of painters. In portraits, it followed the traditions of Raeburn, though men, like Watson Gordon, had a distinction of their own. In landscape, McCulloch and Sambough were distinguished. Harvey bore himself well, both in landscape and subject painting. There is still a school of painting of merit in Edinburgh, though the best men now leave it for London, and the superior wealth and liberality of Glasgow have attracted to it a more distinguished school. Fifty years ago, there was also in Edinburgh a good school of sculpture, of which the veteran, Steel, was the head. Now I think Edinburgh boasts of only one sculptor, though he stands high.

The Courts of Law, and the lawyers occupied a large portion of public attention in Edinburgh and in its immediate vicinity. The judges of the day, I believe, were not inferior in ability or in legal knowledge to their predecessors, but they were different types of

men; they were lawyers, and mere lawyers. There were, if I remember rightly, among the judges only two who were drawn from the old class of the landed aristocracy, which, when Edinburgh was really a capital, had had almost the monopoly of the bench. The rest of the judges were drawn from the middle classes, with the exception of one or two who, it was said, had risen from the lower classes. The judges of that day have been, I am afraid, already forgotten. I remember their names well enough, and as a test how far they had impressed the general public, I hunted for them in the edition of *Chamber's Encyclopædia,* published in Edinburgh in 1900, a popular work supposed to contain notices of all Scotsmen who had done anything worth being remembered, but I found only one of them named, and he was remembered for a peculiar bequest he had made to the universities of Scotland. I hope it may not sound ill-natured, but I am bound to say that I think there was only one of them who was worth remembering. Lord Neaves was one of the few who combined literature with law. He was a contributor to Blackwood and an accomplished scholar, having compiled an excellent Greek anthology, still in popular use. He was one of the men who combined a rare courtesy with the highest ability. A ballad that used to be sung at bar dinners in those days so speaks of him:—

> There is a judge whom all the land esteems as wise and good,
> Most fixed in what he deems the right, yet never harsh nor rude,
> Clear in his office, faithful, just, he is more pleased to bless than ban,
> Thus proving that the soundest law comes from the kindliest man.

He had a rare humor. He wrote many a ballad and song, unluckily all on the forgotten topics of the day, and he had an eloquence both grave and gay. He could let his wit play harmlessly round his audience and he was one of the few who, when occasion required, could address public meetings and rouse them to enthusiasm. The other judges were mostly well-meaning men, but given to a dry style of humor, where the bark, it should be said, was always worse than the bite. Their foible was having a somewhat absurd sense of their own importance. This, I suppose, is to some extent, unavoidable in all provincial dignitaries, but the men in Edinburgh, with their traditions of the old consequence of the place, seem to have been specially exposed to it. At the present day I understand the judges, though my acquaintance with them is now of the smallest, are of much the same type, possibly with even less humor. The aristocratic element has disappeared, and it is said that the lower middle class element is somewhat larger.

The practicing barristers, at the same time when I was at the bar, were of course well known in Edinburgh. Nearly all of them have now left the scene. They were mostly of the same class as the judges, and disappeared, or are disappearing, without leaving a mark behind them. The most brilliant of them was Lord Young who only lately retired from the bench. He was a man well fitted to play a leading part in any sphere of life. He had been one of the very few Edinburgh lawyers who had attained distinction in Parliament. His carrying of the Scottish Education Act of 1872 is still remembered. He was also a vigorous law reformer, going as far as was possible, and his services in that capacity, though invaluable to the public, brought him, I am afraid, little except dislike from the profession. Under a bad system of patronage, he was compelled to take a secondary position on the bench, which gave little scope for his best qualities. All law reform was indeed at a discount with the whole profession. Of codification and unification, nothing was heard. If it was thought of at all, it was as a pestilent heresy, of which there was not the most distant prospect. It was significant of how completely the old intimacy between Scotland and the continent had gone, that no one seemed to know that on the continent the great legal question of the day was codification. Some of the more learned men knew, indeed, of Savigny, but I cannot recollect one who knew of his controversy with Thibaut. The boldest and best of the law reformers could not venture to do anything completely. The day had not come when any one in Great Britain could venture to be a code-maker. To carry anything in the shape of a code would have been impossible, and men who would gladly have done the higher work for which they were well fitted, had to be content to do mere cobbling.

As I remained not quite four years at the bar I had little experience as a practicing advocate. What I had was confined to the criminal side, where I had, indeed, considering my youth, a very considerable practice. Most of the criminal work especially on circuit fell to the juniors, criminals having no money to pay for the services of seniors. But I had a special liking for it. I was always interested more or less in the criminals whom I always believed to be more the victims of misfortune than of malice. Criminal practice suited me, also, because in serious cases there were juries and I could always talk to juries. If it was only a matter of dealing with the common sense of people like myself, I could manage. That faculty stuck to me through life, and when, on the bench, I had to charge juries in the criminal cases, I seldom found that they and I took different views. I only once failed completely and the anec-

dote may be amusing. A prisoner was being tried for stealing a horse. He had taken the plan which higher criminals sometimes take of purchasing the horse and appropriating it without paying for it. The case was doubtful and I suggested to the jury to acquit him. Somewhat to my surprise, they returned in a short time with the unanimous verdict of "Guilty." I had curiosity enough afterwards to ask the public prosecutor if he knew what the jury meant. He told me he had been curious about that, too, and had asked and had been told that the accused was a well-known rascal and, in fact, had once before played the same trick upon one of the jurymen.

The most interesting kind of criminal practice was in cases where assaults had ended in death. The British have always stoutly refused to abolish capital punishment, but they are doing it, nevertheless, in their own fashion. The law remains, but the juries won't enforce it. Constantly the question arose whether a man was to be condemned for murder and sentenced to death, or only to be condemned for culpable homicide and sentenced to some lesser punishment. The law was that if a man committed a serious assault, though he had no intention to kill, he was, if death resulted, liable for murder, and the judges naturally always charged in terms of the law. A senior counsel could hardly recommend a jury to acquit in spite of the law, but a junior counsel—knowing no better—could very well argue that as the accused had no intention to kill, he should not be held "Guilty of murder." This almost invariably led to a difference of opinion. Some of the jury would wish to follow the strict law, others to take the lenient view. Sometimes the majorities were small, but they were almost always in the direction of acquitting of the higher charge. I remember well one case in which a man had stabbed another, and death had resulted. He had not intended to do more than keep the other man from injuring him. The judge quite rightly told the jury that as he had unnecessarily used a knife, he was guilty of murder. I had the chance of speaking before the judge, and I had done all I could to persuade the jury that a man who merely used a knife in order to prevent himself from being injured, could not be brought in "Guilty of murder," and I gained the verdict by 10 to 5. My client was grateful at the moment, but a day or two afterwards he sent me word that he had much rather it had been the other way.

Further cases raising difficulties of the same kind were always cropping up, and sometimes I was not so successful. A mere boy, almost half-witted, who had, out of a wicked curiosity, pushed a child into the clyde and drowned it, was, in spite of all I could do, brought in as "Guilty of murder."

Technically, it was murder, because the boy had sense enough to know that it was wrong to push children into the water and drown them, and the judge, naturally a kind man, felt himself compelled to lay down the law as it stood in the books, and the boy was sentenced to death. Of course, the sentence was not carried out. I appealed to the Home Secretary and the judge himself recommended that the sentence should be commuted. In cases of infanticide, the strict law is against the mother, but is never enforced. The contest between the judges and the juries, as to the carrying out of the criminal law has ended in a victory for the juries. There have been since I was at the bar many cases which, if the strict law had been carried out, would have ended in an execution, but so generally do the juries take the view that the death sentence is not to be imposed except for deliberate premeditated murder that there has not been a single execution in my time either within the territory to which I was attached as a judge, or elsewhere in the north of Scotland.

The criminal work was mostly done on circuit, and the assizes in those days were the occasion of much ludicrously pompous display in the county towns. There used to be grand processions to the court when the judges walked in their robes, preceded by trumpeters and guarded by old-fashioned military weapons which had not seen active service since Flodden. Then after the circuit court there was a dinner attended by all the lawyers in the place, the judge presiding. Sometimes there were amusing scenes at these. The provost of the borough was always by law the principal guest. On one occasion, I remember Lord Chancellor Campbell being present, he happening to have a country seat near the town where the circuit was held. We young counsel were standing round waiting for dinner to be announced, and wondering how the question of precedence between the provost and the chancellor would be settled. Good Lord Neaves, who was judge, saw his way to a joke and proposed to the provost to lead the way. But the provost was a timid creature, and, moreover, was the butcher who supplied the chancellor's table. In terror he backed out and then Lord Neaves gravely referred the question to the chancellor himself. The chancellor, who had no sense of humor, pulled himself up to his full height and said: "I was aware that the royal family and the archbishop of Canterbury took precedence of me, but I was not aware that anyone else did." After this astounding display, Lord Neaves could do nothing else except let the chancellor have his precedence.

Of civil practice I had absolutely none. I once had a case of some importance before the Privy Council in England, but that was because I knew something about the ways of foreign univer-

sities, and my special knowledge was useful, but as to ordinary civil practice I never had any. No agent in the Court of Sessions ever thought of employing me to write even the shortest pleading or to argue the smallest point. I am not mentioning this by way of complaining; I think the solicitors were right. Had I been one I would have been the last person I would myself have thought of employing. When I had none of my criminal friends to stand up for, I was shy, sensitive and easily offended, and I had but little of that quality so essential to success at the bar, which by friends is called confidence, and by enemies is designated by a ruder name. I accordingly got no civil work, and I cannot say that I ever wanted any. I should have been pleased to get the fees, but the cases themselves I had much rather have been without. I never troubled myself in the least at seeing my more successful and better qualified brethren carrying off the prizes. I had, however, to do something to fill up my time and to earn money. The usual resort for a junior in those days, when he had nothing else to do, was to wander up and down the old Parliament House, the Scottish *salle des pas perdus,* or to hang about the fireplaces in it, listening to the stories which the unemployed seniors were fond of telling. I did not care for that form of exercise, or for the stories which were seldom good-natured, and often tinged by coarseness. I employed myself mainly in the library, sometimes on antiquarian work, sometimes on political economy, and occasionally on those parts of the law which I thought might be useful if the codification movement ever began. I contrived to maintain myself partly by reporting and partly by writing for periodicals. By chance I got to be law reporter for the *Scotsmen,* and then afterwards a reporter on one of the regular sets of law reports. These things were not well remunerated, but with them and some help from literature, I contrived to make ends meet. I did a large amount of work for the first edition of *Chamber's Encyclopædia,* mainly of a historical kind; I did none of the legal articles. I wrote literary articles and occasional leaders for the *Scotsmen,* and other papers, one or two of which, in spite of or assisted by my efforts, went defunct. I made, however, absolutely no way at the bar, and I saw little prospect of doing better. I cannot say that I was disliked by my colleagues, but I knew well enough that I was not popular. I made few friends, I may say none, amongst the practicing men, and I had little to do with the amusements of the bar. The Dean, who was President of the Faculty of Advocates, used to give dinners to the members of the bar in turn; I never remember being at even one of them. There were other legal dinners of which I would prefer not to speak about. The

songs and jokes, in which even some of the best men at the bar used to indulge on those occasions, were, to my mind, and I was not more refined than most people, of unspeakable coarseness. They had, I fancy, been handed down from generation to generation of lawyers. As I was getting little benefit by being at the bar, either in profit or amusement, and saw no prospect of doing better, I made up my mind to leave it. I had found I could make a living by my pen and I intended most likely to go to London. My plans were suddenly altered.

This is not a Dick Whittington kind of tale, and I write what happened with exact veracity. It will disappoint any budding lawyer, who may read this with the hope of getting guidance to find that the first thing to give me a start in life was a habit I had got into of being about ten minutes late. As I had no work at the court till the reporting began, which was fully an hour after it met, I had got into the habit of not going punctually up to the court. Residing near me was an elderly gentleman who had got into the same habit, as his business had fallen off, and he no longer was required early. Accordingly we often met and used to walk together to it and we got to be friends. One day, when I arrived somewhat later than usual at the court, I found that my friend had been inquiring for me and I went to see what he wanted. To my surprise, he offered to put me into a legal appointment of something over £500 a year. We had talked about law, and he had taken it into his head that my conversation showed that I had a good knowledge of it. Not to look as if I were too anxious, I asked him to give me a couple of days to consider it, and of course I accepted it when the days were out. I had never even known that he had the appointment to give, which was a fortunate thing for me, as, if I had known, I should most likely have done something by way of showing my independence, which might have repelled him. The appointment was to be the judge of a county court. So little did I know about these things that I did not even know where the place was where I would have to reside and my first business was to find it on the map of Scotland. I was to take the appointment temporarily at first, namely, for six months, and if I acted to his satisfaction, I was to get it permanently. This suited me because I also wanted to see how I should like the office. I accepted the offer without asking advice, and I was told afterwards that I had made a mistake in doing so, because with what was called my "position in criminal law," I would have been certain before long to have got something more eligible. I in no ways cared. I was too happy to quit the Parliament Supreme Court, and I left them never to return, if I

could help it. It was sad that the friend who gave me the appointment did not survive long to give me the benefit of his helpful advice. Not very many months after my appointment had become final, he met with a grievous accident in riding and died from its effects. I thus lost one of the dearest friends I ever had, and the country lost one of its ablest and most estimable judges. It was long before I got over the sense of loneliness with which that loss oppressed me, and as far as I was concerned his place remained always empty.

Scottish law never having been, since it began, subjected to systematic revision, it has naturally become somewhat like a museum of antiquities, and is full of survivals from all the eight or nine centuries for which it is known to have lasted. The name of the office to which I was appointed was one of these survivals and conveyed no idea of its duties. Compared with other civilizations, the period of the Scottish had been short, but it had been quite sufficiently long to fill the law with confusion. The most of our lawyers lived and worked among the survivals from by-gone ages pretty much in the spirit in which peasants harbor among ruins. So long as the purpose of the day was served, few concerned themselves with questions of meaning, origin, or improvement. The name of my office was like many another name in Scottish law. For instance, one of the highest judges is still called a "clerk," and there is an absurd tradition that at one time one of the clerks of court actually usurped the position of chairman, and was able to maintain his place. This tradition of course is nonsense. The origin of the name takes one back to the very beginning of Scottish law when clerks in holy orders were the only lawyers in the country. The name of my office was "Sheriff Substitute," and although every Scotsman knows that it designates the chief resident judge and magistrate of a county, I doubt if there is one in a thousand who could give a rational explanation of its origin. The second half of the name in its present connection is somewhere about three hundred years old. The first half is nearly three times as old, and if I were fanciful, I might see in the popular name of my office, which was the "Shirra," a reminiscence of the Scirgerefa, of the times before Scotland was consolidated into a nation. The name was not, as "Captain" used to be said to be, a good traveling one. Outside of Scotland it is seldom you find one who has even an idea what it means. In England, it is supposed to designate an inferior officer who executes the decrees of other courts. In Ireland, it designates to the popular mind a man who does the like or who merely delivers citations. In America, I found that it designated a criminal officer of

some importance. Any knowledge I was ever able to obtain of foreign languages never supplied me with an equivalent. The name outside of Scotland I found had to be dropped. The nearest expression in our common language which gives an idea of what the office was, is the name which was used for it in Scotland, in the Middle Ages, and especially during the three centuries when Roman Law permeated our system. Down so lately as the time when I passed at the bar, this name was still occasionally in use. In the Court of Sessions he was there frequently called the "Judge Ordinar," a name which in itself dates back almost to the fall of the Roman Empire and seems to have originated in the Ecclesiastical Courts, from which much of our law of process was derived. The "Judge Ordinar" was an official well known on the continent, and there, as in Scotland, it was in the Middle Ages often the subject of a feudal grant, giving it to the holder for life and to his heirs after him. In Ducanze the *Index Ordinarius* is described as having jurisdiction in all those matters which belong to the *imperium* whether *merum* or *mixrum*. In Calvin's *Lexicon Juridicum* he is described as one who has, either in his own right, or by the grant of the Roman Pontiff or of the Emperor, universal jurisdiction to decide all causes. The name "Judge Ordinar" survives in England in its modernized form. In the Probate and Divorce Court, which can be traced back directly to the Ecclesiastical Courts, the principal judge is still called the Judge Ordinary.

There are two kinds of County Court distinct in their origin. The first kind goes back to the ancient tribunals of the time after the fall of the Empire, when each country was divided into districts which were almost independent kingdoms. These courts had the full jurisdiction of a Supreme Court within their territory. This kind has outside of Scotland few living representatives. The other kind originated in what foreign jurists call Bagatelle Courts and had been instituted within comparatively recent times for deciding promptly and cheaply causes which were not of sufficient importance to occupy the time of the higher courts. It was from Bagatelle Courts that the English County Courts and indeed, nearly all of the local courts of Europe, took their origin. Within recent times the two kinds of courts have been approaching each other. Gradually, contractions of the jurisdiction of the older courts and expansions of the jurisdiction of the newer are bringing them together, and the probability is that before very long the line of difference will be obliterated.

The jurisdiction of the Scottish "Judge Ordinar" of the present day still has many attributes of a court of supreme jurisdiction. It

is now, indeed, subject to endless rights of appeal on almost every point and at almost every stage. But, nevertheless, the extent of the jurisdiction still shows its origin. A decision of the House of Lords recognizes the Sheriff Court as a Supreme Court and it sounds like irony to find that on the bench the local judge, with perhaps a tenth of the salary, is addressed with all the dignity of a judge of the Supreme Court, and he has (what a Bagatelle Court never has) power to punish for contempt. His proper civil jurisdiction is very large. All questions of whether money, whatever its amount, is due upon contract or from wrong come before it, and whether what is wanted is a specific sum or a sum in name of damages. Then he can decide all questions whether the person called into court is bound to do or to refrain from doing any act. In matters of succession his jurisdiction extends to all matters concerning movables and to many concerning immovables. In bankruptcy, he has the jurisdiction of a Supreme Court. The exceptions to his jurisdiction in civil matters illustrate well the nature of the jurisdiction where a new form of action has been introduced within recent times that has almost invariably been confined to the Supreme Court. For instance, actions for declaring that rights exist or do not exist, without asking a specific remedy, are incompetent. Since the Supreme Court was instituted there have been many encroachments on the jurisdiction of the "Judge Ordinar," acquiesced in partly, because that official could not help it, and partly because the restrictions were on the whole for the public good. For instance, although his right to decide other matters concerning immovables remains intact, he cannot decide when a question of title comes up. There is no exception of equity. The decision between law and equity had died out in modern Roman Law before its introduction into Scotland, and all Scottish Courts, like Continental European Courts, decide all questions of right, irrespective of whether they originate in what English lawyers would term law or equity.

For other reasons, the local judge has no jurisdiction in questions of marriage, divorce and legitimacy. In the earliest times these belonged to no civil court, but were under the jurisdiction of the bishops and their commissaries. When the Bishops' Courts came to be abolished at the reformation, their superior jurisdiction, including the three matters mentioned, went to the Supreme Court and nothing came to the "Judge Ordinar" except a few matters of minor importance.

In criminal matters the jurisdiction of the "Judge Ordinar" seems, in the earliest times, to have been complete. The first exceptions were made when traveling Courts of Justiciary were instituted

about the beginning of the historic period. What were then called the four pleas of the Crown were made exclusive to the Royal Assizes. The pleas were murder—except when the murderer was caught red-handed—rape, wilful fire raising and robbery. In recent times these exceptions have been somewhat modified and other exceptions have been made. For instance, some offences against the Coining Acts and some against the Poaching Acts are not competent to the "Judge Ordinar."

In regard to punishment, the powers of the "Judge Ordinar" were at one time extensive. He could sentence to death, and that power remained in use till the end of the eighteenth century. In the court books of Kincardineshire, there is a remarkable entry about that time. Two men were being tried, and one in respect the case against him was proven, was sentenced to be hanged at the Gallows-hill. The other in respect the case against him was not proven, was sentenced to see his companion hanged, and then to be kicked through the town by the hangman and banished the shire. The "Judge Ordinar" could inflict corporal punishment of any kind, and he could impose fines unrestricted in amount. He could sentence to imprisonment limited only by the length of time which prison could lawfully detain, formerly three years, now reduced by custom to two. In regard to banishment, his power was naturally restricted to banishing from his territory. He could banish from the shire, but not from the realm. The practice of banishment from the shire endured to recent times, and when I first came to the district the public prosecutor, then a very elderly man, remembered well, a small village on the confines of Kincardineshire, which was inhabited by persons who had been banished from Aberdeenshire. The power of banishment from the shire has fallen into disuse and the power of sentencing to penal servitude which came in place of banishment was never conferred upon the "Judge Ordinar." Criminal punishment was administered either in what is called the "ordinary" way, with the assistance of a jury, or what is called a "summary" way, when the judge sits alone. In the latter form, his powers are considerably reduced,—practically to imprisonment not exceeding two months and to a small fine.* *J. Dove Wilson.*

*The concluding installment of Professor Wilson's article will appear in the February issue.—[ED.]